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IN THE

Supreme Court of the United States

October Term, 1965

No. 1171

VINCENT J. RICCIARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second District, which affirmed the judgment of the United States District Court for the Southern District of New York, convicting him for violations of 29 U.S.C. 186(a)(1), (b)(1) after a trial before Honorable Edward Weinfeld, District Judge, and a jury.

The Opinions Below

The opinions of the Court of Appeals are hereto annexed, not as yet having been officially reported.

Statement of Grounds of Jurisdiction

1. The order of affirmance of the Court of Appeals was rendered on February 4, 1966, and is final.

2. Application for rehearing was filed on February 18, 1966, but was denied by order of the Court of Appeals, filed on March 2, 1966, without opinion.

3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

1. May the operation of multiple dwellings, in which one janitor is employed for each building, be regarded as an industry affecting commerce under 29 U.S.C. 186(a)(1), (b)(1), merely on proof that the fuel used in the buildings was of interstate origin?

2. Was the Trial Court justified in refusing to charge, as requested, that evidence of the consistent refusals of the National Labor Board to set standards and exercise jurisdiction over multiple dwelling operations?—particularly where (a) the Court had submitted the question of effect upon commerce to the jury as one of fact; (b) the Court had ruled as a matter of law, that the operation of multiple dwellings was an activity separate and distinct from other segments of the union's activities; and (c) the Court had allowed evidence, over appellant's objections, of the certification of the union as employee representative in an unnamed segment of its activities.

3. Did the Trial Court commit reversible error in charging the jury that, in determining whether commerce was affected, it was not confined to consideration of the amount of fuel used in the multiple dwellings of the employers named in the indictment, or even by the total amount of fuel used in all multiple dwellings covered by union contracts; but that it could consider the total amount fuel used in all multiple buildings in Bronx County?

Constitution and the Statutes Involved

The Constitution: Art. 1, sec. 8, cl. 3;

29 U.S.C. 186:

(a) "It shall be unlawful for any employer or association of employers or any person . . . who acts in the interest of an employer, to pay, lend or deliver, or agree to pay, lend or deliver, any money or thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce;

* * * * *

(b)(1) "It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) of this section."

29 U.S.C. 142. Definitions:

"When used in this chapter—

(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

* * * * *

(3) The term 'commerce', 'labor disputes', 'employer', 'employee', 'labor organization', 'representative', 'person', and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter."

29 U.S.C. 152. Definitions:

"When used in this subchapter—

* * * * *

(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or Territory or the District of Columbia or any foreign country."

The Statement of the Case[1]

The indictment against the petitioner contained 15 counts. Each count charged him as vice-president of Local-E, Building Service Employees International Union and as a representative of employees engaged in an industry affecting commerce, with unlawfully, wilfully and knowingly requesting, receiving and agreeing to receive and accept a designated sum of money from employers of the employees whom he represented, in violation of 29 U.S.C. 186; each count alleging a separate request, payment and receipt of a stated

[1] Inasmuch as appellant's principal ground for reversal was based upon the lack of evidence to justify the assumption of federal jurisdiction over the operation of multiple dwellings, and the jury's verdict was not challenged as being against the weight of evidence, the appendix omitted the testimony of the appellant and his witnesses as well as the cross-examination of the appellee's witnesses, except that of Henry Chartier, President of 32-E (25a-28a) and a brief excerpt from that of one of the employers (39a—fol. 83).

amount (9a-10a).[2] The period of time during which the payments were allegedly made was from 1959 through 1962.

The petitioner was vice-president of Local 32-E, the great majority of its members being apartment house employees. The employers named in the indictment operated multiple dwellings, consisting of approximately 30 apartments or less; each building serviced but by one employee—a janitor, whose services were considered a "work-out job," as distinguished from a "full-time job" of employees working in larger apartment houses (20a-28a).

Prior to the periods of time mentioned in the indictment, a sub-division of the union, known as Council 7, was created to exclusively cover multiple dwellings. Council 7 had its own separate office in a building separate from that in which 32-E was housed; employed different help; maintained separate books of account and records; used a different printed form of union contract; held its membership meetings on different days and at different meeting places; and its dues and fringe benefits were lower than those of 32-E (26a-28a).[3]

During the time covered by the indictment, the appellant was in charge of Council 7,—particularly as to negotiations

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[2] Parenthetic references are to the page numbers of appellant's appendix, unless otherwise indicated.

[3] The Trial Court ruled and charged the jury (108a—fol. 341; 115a) that the multiple dwelling operation that came within the orbit of Council 7 was the industry in which the employees referred to in the indictment were employed,—following *Carroll et al.* v. *Associated Musicians,* 183 F. Supp. 636, 638-9 (S.D. N.Y. 1960), affirmed, 284 F. 2nd 91 (2nd Cir. 1960); *Carroll et al.* v. *American Federation of Musicians,* 295 F. 2nd 484, 486-7 (2nd Cir. 1961); *Cutler* v. *American Federation of Musicians,* 211 F. Supp. 433, 442-3 (S.D.N.Y. 1962), affirmed 316 F. 2nd 546 (2nd Cir. 1963), cert. denied, 375 U.S. 941 (1963).

of union contracts with the employers (25a—fol. 39). The owners of the buildings or their agents mentioned in the 15 counts testified to the payments or the requests for and promises to pay to the appellants the sums of money alleged in the various counts.

Each employer or his agent testified that negotiations as to the terms and conditions of employment of the janitor employed in each separate building were conducted between himself personally and the appellant; and that the negotiations culminated in a separately signed union contract for each particular janitor.

The appellee relied solely on the use of fuel as evidence of effect on commerce. It was conceded by the parties that the fuel was of interstate origin, although purchased from local dealers (29a-30a). The owners or their agents of the buildings mentioned in seven of the multiple dwellings testified to annual expenditures for fuel in amounts ranging from approximately $1200 to $1500 in a 20 apartment building to approximately $2700 in a 25 apartment building (76a; 70a). There was no evidence of the amount of fuel used in eight of the buildings. Nor was there any proof of the rental income from any building.

From 1959 through 1962, approximately 200 certifications were issued each year, in each instance designating Council 7 as the union representative of the janitor-employee. All of the certifications were issued by the New York State Labor Board—none by the National Labor Board (25a).

Appellant was convicted on all 15 counts. On May 4, 1965, he was sentenced to imprisonment of one year on each of counts 1 through 14, to run concurrently, and to one year

on count 15 with suspension of execution of sentence thereon; and placed on probation for 3 years, to commence after his release from confinement (128a-129a). Appellant is at large pending appeal on bail of $10,000 fixed by the Trial Court. Mandate has been stayed by order of the lower Court, dated March 15, 1966, pending filing of this petition for certiorari and until final disposition therein of the case, subject to the conditions of Rule 28(c) of the Rules of the said Second Circuit Court of Appeals.

THE REASONS FOR GRANTING THE WRIT

I

The decision of the Court below should be reviewed because it extends federal jurisdiction over purely local, intrastate activities far beyond the constitutional limitations implicit in the "commerce clause"; because it appears to have ignored the warnings of this Court against the dangers incident to the assumption of federal power over every state activity, even though not "isolated within the boundaries of a single state"; and also because it appears not to have heeded the need for the caution and "clear findings" of effect upon commerce, which this Court has ruled are prerequisite for the justification of the exercise of the federal power.

National Labor Relations Board v. *Jones & Laughlin,* 301 U.S. 1, 31, 37, 57 S. Ct. 615, 621, 624;

Polish National Alliance v. *N.L.R.B.,* 322 U.S. 643, 650, 64 S. Ct. 1196, 1200.

To quote from the opinion of Mr. Justice Hughes, in *National Labor Relations Board* v. *Jones & Laughlin, supra*:

> "This definition ('affecting commerce'—29 U.S.C.A. Sect. 152) is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

Later, Mr. Justice Hughes said:

> "Undoubtedly, the scope of this power (of control) must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon Congress so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is local and create a completely centralized government."

In *Polish National Alliance, supra,* although finding ample justification for the exercise of jurisdiction by the National Labor Board, Mr. Justice Frankfurter in a majority opinion, also warned against the indiscriminate absorption of legislative power by the United States over state activities —stating:

> "The interpenetrations of modern society have not wiped out state lines. * * * Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity."

In a concurring opinion, Mr. Justice Black elaborated upon the urgent need for the use of caution before deciding that an intrastate activity affects commerce and upon the insistence upon "clear findings" justifying the exercise of federal power in such cases:

> "The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. *Houston, E. & W. Texas Ry.* v. *United States,* 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341; *Second Employers' Liability Cases, Mondou* v. *New York, N. H. & H. R. Co.,* 223 U.S. 1, 46, 47, 32 S. Ct. 169, 173, 56 L. Ed. 327, 38 L.R.A., N.S. 44; and see *Wickard* v. *Filburn,* 317 U.S. 111, 121, 63 S. Ct. 82, 87 L. Ed. 122. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulations. *City of Yonkers* v. *United States,* 320 U.S. 685, 64 S. Ct. 327, 330 and cases therein cited. It has insisted upon 'suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.' Id.: *State of Florida* v. *United States,* 282 U.S. 194, 211, 212, 51 S. Ct. 119, 123, 124, 75 L. Ed. 291; cf. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 133 A.L.R. 1217; *Securities and Exchange Comm'n* v. *Chenery Corporation,* 318 U.S. 80, 92-95, 63 S. Ct. 454, 461, 462, 87 L. Ed. 626."

Although unanimously affirming the judgment of conviction, the opinions of the Court below present what appear to be erroneous and irreconcilable basic views, which nevertheless are in complete agreement upon the absence of any evidence—other than the mere use of fuel of interstate origin—showing that a labor dispute in any of the buildings "would burden or obstruct commerce or the free flow of commerce" (29 U.S.C. 142(1).

Circuit Judge Moore, in his majority opinion, imputed "general knowledge" to the jury that a strike would tend to curtail commerce by reducing the use of fuel (opinion attached—pages 890-891),—citing *9 Wigmore, Evidence,* Section 2569 (3rd ed.); *Commonwealth* v. *Peckham,* 68 Mass. (2 Gray) 514, 515 (1854); *Shikany* v. *Salt Creek Transp. Co.,* 48 Wyo. 190, 45 P. 2nd 645 (1935) and other similar cases. But the doctrine of general knowledge is "strictly limited to a few matters of elemental experience in human nature, commercial affairs and every day life",—to quote Professor Wigmore, *supra.* Besides, in all cases where the doctrine is applied, there must be evidence of certain facts that justify its use. For instance, in *Commonwealth* v. *Peckham, supra,* the court plainly inferred that there must be evidence of "its properties or qualities", before gin can be regarded as intoxicating under the general knowledge rule.

In his opinion, Circuit Judge Waterman disavowed the application of the general knowledge doctrine to this case; and in fact, expressed his belief that in the event of a labor dispute, a decrease in the demand for fuel was not likely to occur. He said at page 906:

> "However, I am not persuaded that it is common knowledge that a labor dispute in this industry would

> decrease the industry's demand for fuel. I should have thought it likely that all the landlords would rapidly make the minor adjustments necessary to operate the heating systems themselves; and that, if this were done, the industry's demand for fuel, would not decrease."

In all probability, Judge Waterman must have been influenced by the fact that we are here dealing with the operation of multiple dwellings, each of which is janitored by but one employee, whose services were considered as a "work-out" job,—not the "full-time" job of superintendents of much larger apartment houses (20a, 28a). It is also understandable why under all the circumstances involved, jurisdiction over labor disputes in this activity was assumed by the New York State Labor Board—never once by the National Labor Board (25a); and why the National Labor Board has never set up standards or exercised jurisdiction over the operation of apartment houses generally. *Carol Management Corporation,* 133 NLRB No. 112, Case No. 22 R.C.—838 (1961); *Horizon House,* 151 NLRB No. 96, Case No. 22 R.C.—2670 (1965).

Virtually all of the cases cited in the majority opinion involve industries or activities that were found by the National Labor Board either to be "in commerce" or in which there were "clear findings" by the Board that the operation of the local, intrastate industry affected commerce beyond a *de minimis* degree through the proof of large purchases and sales of merchandise of an interstate origin. *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) cited on page 892 of the majority opinion has no application, since it is a case dealing with the *public accommodation* part of the 1964 Civil Rights Law,—upholding the consti-

tutionality of the law and affirming a finding in an injunction suit brought under the act, that a restaurant selling food for consumption on its premises, 46% of which originated outside of the state, violated the act, since "a substantial portion of the food which it served . . . has moved in commerce"—as defined by section 201.

Footnote "6" on page 907 of Judge Waterman's opinion, criticizing as it does the majority opinion of the lower Court and its citation of authorities, significantly highlights the inherent weakness in the attempt of both opinions to expand federal jurisdiction beyond its constitutional limitations and possibly speed the way to the complete obliteration of the "distinction between what is local and create a completely centralized government."

> "*United States* v. *Pecora,* 257 F. 2nd 512 (3 Cir. 1959), the only case cited by the majority that arises under 29 U.S.C. section 186 and deals with the rule that well known facts need not be formally proved, is distinguishable. There is a world of difference between taking judicial notice of the proposition that 'interstate highways affect interstate commerce', 267 F. 2nd 512 at 515, and taking judicial notice that a janitors' strike in the Bronx would affect it to a demonstrable degree."

NLRB v. *Reliance Fuel Oil Corp.,* 297 F. 2nd 94 (2nd Cir. 1961), reversed, 371 U.S. 224 (1963), is heavily relied on by Judge Waterman in support of his position that effect upon commerce may be demonstrated by mere purchase of fuel of interstate origin, even though a labor dispute may not result in a diminution of supply of such fuel. But in that case, this Court found that the National Labor Board had adopted its trial examiner's findings that the opera-

tions of Reliance affected commerce within the meaning of the Act (29 U.S.C. 151 *et seq.*) and that the unfair labor practices found tended "to lead to labor disputes burdening and obstructing commerce and the free flow of commerce * * *." The Court concluded at pages 226-7:

> "Through the National Labor Relations Act, '* * * Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines, adversely affect such commerce.' *Polish National Alliance of United States of North America* v. *National Labor Relations Board,* 322 U.S. at 648, 64 S. Ct. at 1199. This being so, the jurisdictional test is met here: the Board properly found that by virtue of Reliance's purchases from Gulf, Reliance's operations and the related unfair labor practices 'affected' commerce within the meaning of the Act."

The predominating distinguishing feature between *Reliance* and the instant case is evident: in *Reliance* there were "clear findings" of "affect on commerce",—while here, the majority of the Court below relied on the doctrine of "general knowledge" to establish it and Judge Waterman, in effect, disclaimed the existence of findings that a labor dispute would lead or tend to lead to a situation where the use of the interstate fuel would be interrupted and even went so far as state that there was no likelihood of such an occurrence.

II

The Trial Court committed reversible error in refusing to charge the jury, as requested, that in determining whether the operation of multiple dwellings affected com-

merce, it could take into consideration evidence that the National Labor Board never took jurisdiction over labor disputes involving those buildings, but that jurisdiction over them was exercised exclusively by the New York State Labor Board. (Appellant's request to charge No. V—16a; Trial Court's refusal to charge—122a)

A

The Trial Court submitted to the jury the issue as to whether or not commerce was affected by the use of fuel in the operation of the multiple dwellings (115a-117a).

Mr. Chartier, president of Local 32-E and witness for the appellee testified that during 1959 and 1962, all certifications of representations of employees of multiple dwellings of Council 7—amounting to 200 each year—were issued by the New York State Labor Board,—*none by the National Labor Board* (25a—fol. 40). The evidence of these consistent refusals of the National Labor Board to assume jurisdiction over multiple dwellings operation was therefore important in assisting the jury in making the determination that was thrust upon it by the Trial Court.

Labor Boards are equipped with such great expertise as to give considerable weight to their rulings. While their rulings would not be conclusive or binding on the jury, they are at least entitled to as much consideration in guiding its deliberation as that of expert evidence upon any specialized subject. Regarding the weight to be given to the rulings of the Wage and Hour Administrator, Mr. Justice Jackson had this to say in *Skidmore* v. *Swift & Co.*, 65 S. Ct. 161, 164, 323 U.S. 134, 140:

> "We consider the rulings, interpretations and opinions of the Administrator, under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experienced and informed judgment, to which the courts and litigrants may properly resort for guidance."

Again, appellant draws this Court's attention to the rulings of the National Labor Board in *Carol Management Corporation* and *Horizon House supra,* where it is stated that the Board has never set up standards or exercised jurisdiction over apartment house operations—*and this should apply particularly to the small multiple dwelling field where each building employed one "work-out" janitor.*

B

There is another reason why evidence should have been submitted to the jury of the National Labor Board's persistent refusals to assume jurisdiction over the multiple dwelling operations. Over the objection of appellant, Mr. Chartier in his direct examination by appellee, was permitted to testify that Local 32-E *had been certified by the National Labor Board.* His testimony:

> "Q. Has Local 32-E ever been certified by the National Labor Board?
>
> Mr. Wolf: I object, if your Honor pleases.
>
> The Court: Overruled.
>
> A. Local 32-E, yes.
>
> Q. Do you know when that was, sir? A. June, 1961" (24a).

While no proof was introduced as to what particular field of activity within 32-E was the object of the 1961 certification, certainly the appellant was entitled to dispel any pos-

sible doubt created in the minds of the jurors that the certification might relate to the multiple dwellings within the orbit of Counsel 7's activities and for that reason the operation of these buildings had come within the reach of federal jurisdiction.

III

The Trial Court committed reversible error in charging the jury that, in determining whether or not commerce was affected, it was not confined to consideration of the amount of fuel used in the multiple dwellings of the employers named in the indictment,—or even by the total amount of fuel used in all of the multiple dwellings in Bronx County covered by Council 7 union contracts; but that it could consider the total amount of fuel used in all multiple dwellings in Bronx County. (Trial Court's charge—115a, 116a; appellant's exceptions—121a)

A

It is to be borne in mind that this case involves alleged violations of a penal statute—29 U.S.C. sec. 186—and that a strict construction of that statute is required.

> *Yates* v. *U.S.*, 354 U.S. 298, 310-11, 77 S. Ct. 1064, 1072-3;
> *U.S.* v. *Norton*, 179 F. 2nd 527, 529 (2nd Cir.)

The applicable portions of sec. 186 read as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person . . . who acts in the interest of an employer, to pay, lend or deliver, or agree to pay, lend or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

* * * * *

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) of this section."

In each of the 15 counts of the indictment, it is charged that the defendant "as a representative of employees engaged in an industry affecting commerce" with unlawfully requesting, receiving and agreeing to receive a designated sum of money from each of 15 named employers of the employees whom he represented in violation of section 186.

A strict construction of the statute should limit the calculation of the affect upon commerce to the amount of interstate fuel used in the buildings of the employers named in the indictment,—with proof, of course, that work stoppage in those buildings would interfere with or obstruct the flow of such fuel. There was no evidence to link the 15 buildings with the thousands of others of the same kind or to show that work stoppage in any of the 15 could possibly contribute to stoppages in any of the others.

The necessity for strict construction of the statute is peculiarly urgent in this case. Undoubtedly, the jury—to whom the issue of effect upon commerce was submitted—must have been much influenced by the emphasis placed by the Court upon the vast aggregate amount of fuel used in

the thousands of multiple dwellings in the area,—regardless of the lack of evidence upon which a clear finding could be based as to the actual effect upon commerce through the use of the fuel.

B

It follows that the mere multiplication of the amount of fuel used in one building by 15 or perhaps by thousands of similar buildings *per se* will not put any single building in the category of an industry or activity affecting commerce. Absent the *"clear findings"* of work stoppage that would affect the flow of the fuel in commerce to any degree in any single building, the result of *effect* upon commerce would be *zero*. Multiplication of the *zero effect* of any single building by 15 or even by thousands of others would leave the *zero effect* unchanged, even though resulting in fuel figures of much larger proportions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE WOLF
Attorney for the Petitioner

APPENDIX

Opinions of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 135 & 146—September Term, 1965.

(Argued November 15, 1965 Decided February 4, 1966.)

Docket Nos. 29796 & 30015

Docket No. 29796

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT J. RICCIARDI,

Appellant.

Docket No. 30015

UNITED STATES OF AMERICA,

Appellee,

—v.—

STANLEY M. UNGER,

Appellant.

Before:

MEDINA, WATERMAN and MOORE,

Circuit Judges.

Appeals from judgments of conviction for violations of 29 U. S. C. §186, entered on jury verdicts of guilty after trials in the United States District Court for the Southern District of New York, Thomas F. Murphy and Edward Weinfeld, *Judges.* Affirmed.

GEORGE WOLF, New York, N. Y., *for the appellant Ricciardi.*

VINCENT J. FULLER, Washington, D. C. (Robert L. Weinberg, Washington, D. C., with him on the brief), *for the appellant Unger.*

NEIL PECK, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Richard A. Givens and Douglas S. Liebhafsky, Assistant United States Attorneys, on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

In 1964 Vincent J. Ricciardi and Stanley M. Unger, Vice-President and Secretary-Treasurer, respectively, of Local 32-E of the Building Service Employees International Union, both were indicted under 29 U. S. C. §186 for knowingly demanding and receiving money from employers of whose employees Ricciardi and Unger were representatives. During the years in question, Local 32-E had approximately 8,000 members, most of them building superintendents of apartment houses in Bronx and Westchester Counties, New York, but some of them employed in various country clubs in the area, at race tracks, in a department store, and in an amusement park. Unger worked primarily for Local 32-E itself; Ricciardi was in charge of Council 7, a subdivision of Local 32-E representing employees in small apartment buildings, generally with 30 or less apartments.

The employers who made the payments which were the subject of the indictments against Ricciardi and Unger were owners of apartment houses in the Bronx.

After trial before Judge Weinfeld, the jury found Ricciardi guilty on fifteen counts. He was sentenced to one year on each of the first fourteen, the sentence to be served concurrently, and was given a suspended sentence of one year on the fifteenth count. After trial before Judge Murphy, the jury found Unger guilty on three counts. He was sentenced to one year on each count, the sentences to be served concurrently.

Ricciardi and Unger were tried separately. In the appeals before us, Ricciardi challenges only the existence of jurisdiction under the statute; Unger challenges not only the existence of jurisdiction but also the indictment, the trial court's construction of the substantive provisions of the statute, and the sufficiency of the evidence under the substantive provisions of the statute.

I. *Jurisdiction Under the Statute.*

The indictments against both Ricciardi and Unger were phrased in terms of subsections (b)(1) and (a)(1) of 29 U. S. C. §186. Read together, the two subsections make it unlawful "to request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value," 29 U. S. C. §186(b)(1), from an employer "to any representative of any of his employees who are employed in an industry affecting commerce . . . ," 29 U. S. C. §186 (a)(1). The jurisdictional test for the cases against both appellants is therefore: are any of the employees of the

employers who made the payments "employed in an industry affecting commerce"? 29 U. S. C. §142(1) defines "industry affecting commerce" as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce"; and "commerce" in turn is defined by 29 U. S. C. §152(6) to mean "trade . . . among the several States . . ."

Although in both cases now before us the jurisdictional question was submitted to the jury, the question of what activities constitute an "industry affecting commerce" under 29 U. S. C. §186 has almost always been regarded as a question of law for the court to decide, leaving to the jury only the determination of what activities the defendant had in fact engaged in. *United States* v. *Gibas,* 300 F. 2d 836, 839 (7th Cir.), *cert. denied,* 371 U.S. 817 (1962); *United States* v. *Pecora,* 173 F. Supp. 764 (W. D. Pa. 1958), *aff'd* 267 F. 2d 512 (3d Cir. 1959); see *United States* v. *Donovan,* 339 F. 2d 404, 410 (7th Cir. 1964). The same allocation of function between court and jury has also been made under the similar Hobbs Act, 18 U.S.C. §1951, which proscribes the obstruction of commerce by robbery or extortion. *United States* v. *Green,* 246 F. 2d 155, 160-61 (7th Cir.), *cert. denied,* 355 U. S. 871 (1957); *United States* v. *Lowe,* 234 F. 2d 919, 922 (3d Cir.), *cert. denied,* 352 U. S. 838 (1956); *United States* v. *Varlack,* 225 F. 2d 665, 670, 672 (2d Cir. 1955); *Hulahan* v. *United States,* 214 F. 2d 441, 445-446 (8th Cir.), *cert. denied,* 348 U. S. 856 (1954); *Nick* v. *United States,* 122 F. 2d 660, 673 (8th Cir.), *cert. denied,* 314 U. S. 687 (1941).

A. *Ricciardi.*

Ricciardi maintains, not that the submission to the jury of the jurisdictional question was prejudicial to him, but that improper standards were used to resolve the question and that there was insufficient evidence to support a finding that the employees worked in an "industry affecting commerce."

Ricciardi claims in particular that a charge should have been given to the effect that the exclusive handling by the New York State Labor Board of labor disputes in multiple dwellings was evidence that the operation of such buildings did not affect interstate commerce. We disagree and hold that the trial judge was under no obligation to tell the jury to consider what the New York Board thought its jurisdiction was, in determining whether the operation of the buildings "affects commerce."

Nor did the trial judge err in instructing the jury that it could consider that the industry in question included all apartment houses in the Bronx with 30 or less apartments, whether or not they had contracts with Council 7 of Local 32-E. The general statutory definition in 29 U. S. C. §142 (1) makes clear that an industry may be one "affecting commerce" if a labor dispute in the industry would tend to burden commerce. To apply this jurisdictional test, the relevant industry must first be determined. 29 U. S. C. §186(a)(1) and (b)(1) prohibit payment and the receipt of payment from an employer "to any representative of any of his employees who are employed in an industry affecting commerce." To confine the term "industry" to the business activities of the employers who made the allegedly unlawful

payments, or to the business activities of employers whose employees were represented by the recipients of such payments from employers, would be contrary to the broad connotations of the term "industry." Instead, the relevant industry for the purposes of 29 U. S. C. §186(a)(1) and (b)(1) comprises all business activities in the same field as the business activities of employers whose employees were represented by the recipients of the allegedly unlawful payments. Applying this test, it was not error for the trial court to instruct the jury that the relevant industry was "the ownership, operation and management of apartment houses in the Bronx of 30 or less apartments."

Ricciardi's challenge to the sufficiency of the evidence of jurisdiction must also fail. There was no dispute that the superintendents represented by Local 32-E ran the furnaces for their buildings, nor that the fuel for those furnaces, although purchased from local distributors, came ultimately from out of state. Ricciardi argues that the amount of fuel used in the small apartment houses in the Bronx whose owners made payments to him was so small that it could have no "significant effect upon the stream of commerce," and could not deflect its flow "by so much as a microscopic ripple." But the President of Local 32-E and Ricciardi himself testified that in 1959 Council 7 of Local 32-E, the subdivision headed by Ricciardi, represented employees in between 700 and 1,000 buildings with 30 or less apartments. A number of employers who made pay-offs to Ricciardi testified that their fuel bills ran from $1,200 (for a 20-unit building) to $4,500 (for a 28-unit building) a year; and no evidence was offered by Ricciardi which would

indicate that these figures were not representative of the industry.

To be sure, there was no testimony which said in so many words that a strike by the superintendents of the buildings with 30 or less units, who were represented by Council 7 of Local 32-E, would tend to curtail interstate commerce; but the Government should not be penalized for its failure to belabor the obvious. As Mr. Justice Metcalf wrote in *Commonwealth* v. *Peckham,* 68 Mass. (2 Gray) 514, 515 (1854): "Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters." See also *Rostad* v. *Portland R'y, Light & Power Co.,* 101 Ore. 569, 581, 201 Pac. 184, 188 (1921) ("triers of fact cannot, in the nature of things, be divested of general knowledge of practical affairs"); McCormick, Evidence §324 at p. 691 (1954); 9 Wigmore, Evidence §2569 (3d ed. 1940); Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 272 (1944). If a jury does not need to be told that gin is intoxicating, *Commonwealth* v. *Peckham, supra,* or that good rugs are valuable, *Shikany* v. *Salt Creek Transp. Co.,* 48 Wyo. 190, 45 P. 2d 645 (1935), or that spare parts were difficult to obtain in this country during 1943 and 1944, *Holt* v. *Pariser,* 161 Pa. Super. 315, 54 A. 2d 89 (1947), the jury here did not need to be told that a strike or a slow-down by employees who run machines would affect the amount of material used in the machines. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469 (1940). To paraphrase Rule 9 of the Uniform Rules of Evidence, the proposition is one of generalized knowledge so universally known that it cannot reasonably be the subject

of dispute. The jury could apply this proposition to the testimony before it as to the responsibilities of the building superintendents and as to the amount of fuel used in the buildings, and conclude that a labor dispute in the industry would interfere with the sale or distribution of out-of-state fuel on other than a *de minimis* basis.

The Supreme Court has repeatedly said that in passing the National Labor Relations Act, Congress intended the coverage of the Act to reach to "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Co.*, 371 U. S. 224, 226 (1863); see *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1, 3 (1957). The same may fairly be said of the congressional intent as to the statute now under consideration, since the Labor-Management Relations Act of 1947, of which the predecessor of the present 29 U. S. C. §186 was a part, referred to the definition of "commerce" used in the National Labor Relations Act, see 29 U. S. C. §142(3), and since the definition of "industry affecting commerce" in the new act, 29 U.S.C. §142(1), closely parallels the definition of "affecting commerce" in the National Labor Relations Act, 29 U. S. C. §152(7). On the basis of evidence introduced by the Government and common knowledge as to the effects of strikes and slow-downs, there is no question but that the activities here in question fall within the permissible reach of the commerce clause. See *Katzenbach* v. *McClung*, 379 U. S. 294 (1964) (Civil Rights Act of 1964, as applied to a restaurant buying less than half its food supplies—some $69,683 a year—from out of state, held constitutional); *Wickard* v. *Filburn*, 317 U. S. 111

(1942) (Congress under the commerce clause can set limits to wheat production even if the farmer consumes all of his own production on his farm); *United States* v. *Darby*, 312 U. S. 100 (1941); *NLRB* v. *Fainblatt*, 306 U. S. 601 (1939).

We hold that proper standards were used to resolve the jurisdictional question and that there was sufficient evidence of jurisdiction under the statute in Ricciardi's case.

B. *Unger.*

Unger's challenge to jurisdiction under the statute raises somewhat different problems than Ricciardi's similar challenge, since different evidence was introduced in support of jurisdiction and since the trial judge's conception of the proper jurisdictional test differed from the test used by the judge before whom Ricciardi was tried.

The indictment against Unger was couched in terms of 29 U. S. C. §186(a)(1) and (b)(1), under which the correct jurisdictional test is: are any of the employees of the employers who made the payments "employed in an industry affecting commerce"? This was the test employed by the trial judge in Ricciardi's case. In Unger's case, however, the trial judge denied a requested charge to this effect, and charged instead that the test is "whether the employers of all the employees in the union are in an industry affecting commerce." The charge given permitted the jury to consider on the question of jurisdiction not only the fuel purchased by the apartment houses but also the out-of-state aspects of the racetracks and the department store at which members of other branches of Local 32-E were employed.

We believe that this instruction, although erroneous, was not prejudicial to Unger, because the undisputed evidence establishes jurisdiction under the statute as a matter of law.

The president of Local 32-E testified without contradiction that this local, which represented employees of the employers who made the payments to Unger, had organized approximately 5,500 apartment buildings in Bronx and Westchester Counties by 1959; that members of Local 32-E were superintendents of these buildings; and that the superintendents were responsible for servicing the heating systems in the buildings. It was stipulated between the parties that the oil, coal, and gas used as fuel in the buildings, although purchased from local distributors, came from outside of New York State.

The Government adduced no proof of the dollar volume of the fuel consumed in apartment buildings organized by Local 32-E; nor was there any testimony to the effect that a strike or slow-down by the superintendents would affect the purchase of fuel used in these buildings. But in the words of Coleridge, *J.*, "Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with." *Lumley* v. *Gye*, 2 El. & Bl. 216, 217, 118 Eng. Rep. 749, 768 (Q. B. 1853). In deciding what constitutes an "industry affecting commerce" as a matter of law, we may take judicial notice of the obvious and the indisputable. It cannot be disputed that the amount of fuel used in 5,500 apartment buildings is substantial, and has a substantial dollar value. Nor can it be disputed that a slow-down or strike by the superinten-

dents who run the heating systems would affect the amount of fuel used in the buildings in a significant way. Of course we cannot decide whether the effect would be long-lasting: the record affords no information, nor is it common knowledge, whether labor disputes in the apartment building industry in the Bronx and in Westchester are long-lasting, or whether landlords could run the furnaces themselves or get outside help in running them. But we need not decide that the effect upon interstate commerce would be drastic, before we can hold that the Government has satisfied the jurisdictional requirements of the statute. The statute requires only that a labor dispute in the industry would "tend to burden or obstruct" interstate commerce, 29 U. S. C. §142(1). Interpreting this phrase in light of the congressional intent that jurisdiction under the statute should be as broad as constitutionally permissible, jurisdiction is established as a matter of law if there is no question but that a labor dispute in the relevant industry would have a palpable effect on interstate commerce. Given the unquestioned evidence of the number of buildings involved and the responsibilities of the superintendents, we can take judicial notice that a labor dispute involving the apartment buildings would have a palpable effect on interstate commerce.

We find support for our action in a long series of cases in which federal courts have taken judicial notice of indisputable facts in appraising the effect of given activities upon interstate commerce. As the Supreme Court said in one of the turning-point cases during the era popularly referred to as the New Deal, effects on interstate commerce

"must be appraised by a judgment that does not ignore actual experience." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42 (1937). In *Murray* v. *Union Pacific R.R.*, 77 F. Supp. 613 (N. D. Ill. 1948), the court took judicial notice of the nature of the defendant railroad's activities in Illinois, in deciding that service of process upon the defendant in Illinois did not improperly burden interstate commerce. In *NLRB* v. *Vulcan Forging Co.*, 188 F. 2d 927 (6th Cir. 1951), the court held that in determining whether the NLRB had jurisdiction over a company which sold all of its output to Ford Motor Company, judicial notice could be taken of the interstate activities of Ford. In *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1955), the district court took judicial notice that many of the industries served by the plaintiff bus line were interstate commerce, before it held that the activities of the bus company, although wholly intrastate, affected interstate commerce. In *Goldberg* v. *Arnold Bros. Cotton Gin Co.*, 297 F. 2d 520 (5th Cir. 1962), the Fifth Circuit stated that in considering whether cotton gin workers were engaged in the production of goods for interstate commerce, the trial court on remand could take judicial notice of the interestate movement of cotton in Texas, if it appeared to be of general knowledge and authoritatively settled. Finally, in *United States* v. *Pecora*, 267 F. 2d 512 (3rd Cir. 1959), a case arising under 29 U. S. C. §186, the trial court had instructed the jury that if a state road being built by employees represented by the defendant "was to accommodate interstate traffic to any extent," this satisfied the jurisdictional requirements of the statute. The Third Circuit affirmed, not by approving the instruction of the trial

judge, but by taking judicial notice that the state road affected interstate commerce, since it lead into interstate highways. The court said that an actual count of the number of cars on the road bound for some point outside of the state was not necessary.

II. *The Adequacy of Unger's Indictment.*

Unger argues first that the indictment against him was defective in that it was based on inadequate evidence and should be dismissed unless the Government showed that there was sufficient evidence before the grand jury to establish the "industry affecting commerce" element of the offenses alleged. Courts are extremely reluctant to dismiss indictments because of the inadequacy or incompetence of the evidence before the grand jury. The Supreme Court has repeatedly ruled "that an indictment returned by a legally constituted nonbiased jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." *Lawn* v. *United States*, 355 U. S. 339, 349 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956). The refusal of a trial judge to dismiss an indictment for inadequacy of the evidence before the grand jury will be reversed only in the most unusual circumstances, as in *United States* v. *Tane*, 329 F. 2d 848 (2d Cir. 1964) (indictment rested almost exclusively on wiretap evidence). Judge Murphy acted well within the scope of his discretion in refusing to dismiss Unger's indictment on this ground.

Unger also urges that his indictment was defective in that it did not allege what "industry affecting commerce" was involved, and therefore did not give him adequate

notice to enable him to prepare his defense. As we said in *United States* v. *Varlack*, 225 F. 2d 665, 670 (2d Cir. 1955), in which we upheld a conviction under the Hobbs Act although the indictment did not allege that the "commerce" affected was "interstate commerce":

> "The indictment might well have contained a reference to the nature of the commerce affected and to the other clarifying details suggested by the appellant. The question before us, however, is not whether the indictment filed is, in all respects, the best that could have been drafted but rather, whether the omissions alluded to so completely denuded the charges of so much informative data as to deprive appellant of his right to be apprised of the charge he was required to meet and to be protected against being tried twice for the same offense. The test is a practical one and one which may be met despite the fact that the iindictment could have been made more definite and certain. We are certain that the indictment filed did fulfill at least these minimal requirements."

As in the *Varlack* case, the defendant here had ample time to move for a bill of particulars to remove such doubts as he may have had about the nature of the offense charged. He did not do so. We also note that other courts have upheld against attack indictments under the same statute which merely alleged that the employer was engaged in an industry affecting commerce. *United States* v. *Inciso*, 292 F. 2d 374 (7th Cir.), *cert denied*, 368 U. S. 920 (1961); *United States* v. *Auto Rental Co.*, 187 F. Supp. 603 (W. D. Pa. 1960); *United States* v. *Lavery*, 161 F. Supp. 283 (M. D. Pa. 1958).

Unger maintains that the indictment should be dismissed as duplicitous, since it charges him with receiving payment both as a representative of employees and as an officer of a labor union, each of which is a separate offense under §186. *United States* v. *Donovan,* 339 F. 2d 404 (7th Cir. 1964), *cert. denied,* 380 U.S. 975 (1965). Even if we were to follow *Donovan,* however, this case seems distinguishable, since the indictment made clear that it was directed at Unger's receipt of money in his capacity as a representative of employees. The indictment reads " . . . the defendant, a representative of employees who were employed in an industry affecting commerce, to-wit, Secretary-Treasurer, Local 32-E . . ." The "to-wit" indicates that Unger's union office was alleged only to specify the way in which Unger was a representative of the employees.

Nor is the indictment duplicitous for charging that Unger did "receive and accept" and did "agree to receive and accept" unlawful payments. The two clauses may state separate offenses, see *Burton* v. *United States,* 202 U. S. 344, 377 (1906); but the offenses were based on the same transactions and carried with them the same penalty, and the indictment was phrased in the conjunctive. Under these circumstances we do not think that the use of both phrases in the indictment could have confused or prejudiced Unger in his defense. See *Dranow* v. *United States,* 307 F. 2d 545 (8th Cir. 1962); *Kitchens* v. *United States,* 272 F. 2d 757, 761 (10th Cir. 1959), *cert. denied,* 362 U. S. 942 (1960); Orfield, Joinder in Federal Criminal Procedure, 26 F.R. D. 23, 33 (1960).

III. *The Trial Court's Construction of the Nonjurisdictional Elements of the Statute.*

Unger maintains that the trial court misconstrued §186 by charging that the statute:

> does not make conscious wrongdoing a constituent of the crime; it is a criminal provision which outlaws all payments without exceptions not here involved between employer and the representative. In short, if you find that the loans were made beyond a reasonable doubt, it makes no difference whether the defendant and Jakubovitz were old personal friends or whether the defendant did not intend to do any wrong.

According to Unger, the prosecution should have to prove that the payment or loan to the employee representative was made *because* the recipient was an employee representative, and not for some other reason such as personal friendship. However, Unger can cite no case which so much as suggests that payment because of personal friendship is a defense. We think the trial court's interpretation of the statute was correct. If the Government had to prove evil motive in every case under the statute, its burden would become very much heavier. It seems reasonable to impute to Congress an intent to outlaw *all* payments, with certain narrow statutory exceptions, from employer to union official. This court so held *per curiam* in *United States* v. *Ryan*, 232 F. 2d 481, 483 (2d Cir. 1956), saying that the statute forbids payments:

> of all kinds by employers to "representatives," save as excepted . . . True, it then covers gifts, however trifling and innocuous, but we can see no reason on

> that account to narrow its scope. The penalties prescribed make it apparent that they could not have been meant as sanctions for heinous offences; and Congress may well have wished to put a stop to the practice, even on occasions inconsiderable and harmless in themselves, rather than to make verbal distinctions that would be troublesome in application. The propriety of any gift to a fiduciary with whose beneficiary the donor is apt to come into competition is surely open to scrutiny, and it is a reasonable way of dealing with the evils that may be involved to taboo all such rather than to undertake the difficult task of ascertaining the motive in every case.

Nor did the trial court err in failing to give Unger's requested charge that the jury must find Unger not guilty unless they find that Unger knew he was violating the law or acted in reckless disregard of the requirements of the law. The trial court in *United States* v. *Ryan* held that it was enough if the employee representative received money "with knowledge (1) that he was receiving or accepting money and (2) that the person who was giving him the money was an employer of employees that he represented." 128 F. Supp. 128, 133 (S. D. N. Y. 1955), *rev'd on other grounds,* 225 F. 2d 417 (2d Cir. 1955), *rev'd* 350 U. S. 299 (1956). The Supreme Court indicated that the statute was "a criminal provision, *malum prohibitum,* which outlaws all payments, with stated exceptions, between employer and representative." 350 U. S. at 305. On remand, we held *per curiam* that the statute covers "situations which do not involve conscious wrongdoing," 232 F. 2d 481, 483 (2d Cir. 1956), and referred with approval to the interpretation of the trial court. See also *United*

States v. *Keegan*, 331 F. 2d 257, 262 (7th Cir.), *cert. denied*, 379 U. S. 828 (1964).

IV. *The Sufficiency of the Evidence against Unger.*

Unger argues that, as to one of the three counts of which he was convicted, there was insufficient evidence to show that Unger took money from an employer, knowing that the money was intended for him. A little before Christmastime, one Feiber gave Unger an envelope containing various other envelopes, each with sums of money. The envelopes were labelled with the names of various people at the union office. Unger says the evidence indicated that he took only "as a conduit for Feiber's generosity." However, Feiber testified that $50 was meant to be for Unger; and Unger himself admitted that one of the envelopes bore his name. On the basis of this testimony, the jury could well have found beyond a reasonable doubt that Unger knew that some of Feiber's money was intended for him.

V. *The Variance between the Government's Proof against Unger and the Government's Bill of Particulars.*

Unger's final argument is that the Government's bill of particulars alleged that two of the employers, Jackubovitz and Feiber, made their loans or payments "for themselves," whereas the Government's proof indicated that Jakubovitz had an interest in apartment houses only as a joint venture and that Feiber's interest in apartment houses was only as a corporate official and shareholder of corporations owning apartment houses. It is hard to see

how this variance could have prejudiced Unger. In any case any unfair surprise could have been remedied by a motion for a continuance, which was not made here. See *United States* v. *Glaze*, 313 F. 2d 757, 760 (2d Cir. 1963); *United States* v. *Burgos*, 269 F. 2d 763, 767 (2d Cir. 1959).

VI. *Conclusion.*

Both convictions must be affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result reached by the majority on the ground that proof of effect on interstate commerce is not required on a case-by-case basis in prosecutions commenced under 29 U.S.C. §186(a) and (b).

Subsection 186(b) makes it unlawful "for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value" prohibited by subsection (a) of that section. And subsection (a) (1) prohibits an employer from making or agreeing to make any payment, loan, or delivery of money or other thing of value "to any representative of any of his employees who are employed in an industry affecting commerce . . ." 29 U. S. C. §186(a) (1). 29 U. S. C. §142(1) states that the term "industry affecting commerce" as used in section 186 "means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." Finally, 29 U. S. C. §152(6) states that the term "commerce" means "trade, traffic, commerce, transportation, or communication among the several

States . . ." In brief, in order to successfully prosecute Ricciardi and Unger under Section 186(a) and (b) it was incumbent upon the Government to show that the employees of the employers who made the payments to these defendants were in an industry "affecting" commerce. Section 142(1) allowed the Government to make this showing by proving either that the industry or activity in which these employees were employed was itself "in commerce" or that a labor dispute in the industry or activity "would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce."

In Ricciardi's case the Government did not seriously attempt to establish that the employees of the landlords who had made the payments to Ricciardi were in an industry or activity that was itself "in commerce"; instead, the Government sought to establish that these employees were engaged in an industry or activity in which a labor dispute would burden or obstruct commerce. The trial judge ruled that the ownership, operation and management of apartment houses in the Bronx of thirty or less apartments was the relevant industry.[1] It was then established that the number of such apartment houses covered by contracts with the Union numbered between 800 and 1,000 in 1959 and that since then they had increased at the rate of approximately

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[1] As Judge Moore correctly states in his opinion, the trial judge in Ricciardi's case correctly ruled that only the particular business in which the employees of the employer (or employers) named in the indictment were engaged comprised the "industry" pertinent to an indictment framed in terms of 29 U. S. C. §186(a) and (b), but he also held that the jury in considering how commerce might be affected could consider the entire industry of which these businesses were but a part rather than only the business of the employers the indictment named.

300 a year so that by 1962 there were nearly 2,000 such buildings. It was also established that fuel bills in this industry ran from $1,200 (for a twenty-unit building) to $4,500 (for a twenty-eight unit building), and it was stipulated that the oil, coal and gas used as fuel in apartment buildings in the Bronx, though purchased by the landlords from local distributors, came from outside the State of New York. At the close of the Government's case, and again after all the evidence had been presented, the trial court denied the defendant's motions to dismiss the indictment and for a directed verdict of acquittal for failure of proof, and instructed the jury that: "If, upon all the evidence you find that the purchase, sale, transportation or distribution of fuel originating outside the state, and normally required by the industry, would be interfered with by a stoppage or strike, then you have sufficient upon which to find that it is an industry affecting commerce."[2] The question to be answered on appeal in Ricciardi's case is whether the trial judge erred in ruling that there was sufficient evidence to allow this issue to go to the jury.

Unger's case, as the majority notes, presents somewhat different questions; there the trial judge seems to have instructed the jury that in deciding whether the employees of the employers who made the payments to Unger were "employed in an industry affecting commerce" the jury might consider the industry or activity of all the employers

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[2] Ricciardi's case went to the jury on the single theory that even though the industry in which the employees of the landlords named in the indictment were engaged was not "in commerce" it might be said to be one "affecting commerce" if the jury could conclude that it was an industry in which a labor dispute would tend to burden commerce.

having contracts with Unger's union and that it did not have to confine its attention to the operation of multiple dwellings in the Bronx, the industry or activity of the employers mentioned in the indictment. I agree with my brothers that in so charging the jury the trial court erred; a proper charge would have limited the jury's consideration to the industry or activity of the employers mentioned in the indictment.[3]

In Unger's case the undisputed evidence established only that the union of which Unger was secretary-treasurer and which represented the employees of the employers who made the payments to Unger had organized by 1959 approximately 5,000 apartment buildings in Bronx and Westchester Counties, that members of this union were superintendents of these buildings and responsible for their heating systems, and, by stipulation, that the oil, coal and gas used as fuel in the buildings was purchased from local distributors but came from outside of New York State. There was no evidence tending to prove the dollar value of the fuel consumed in the apartment buildings organized by Unger's union. The question before us in Unger's case is whether this evidence, without more, suffices to establish that the employees of the employers who made the payments to Unger were "employed in an industry affecting commerce" as a matter of law.

It must be emphasized that at neither trial did the Government adduce any evidence tending to show that a labor dispute in the industry would in fact "affect" commerce by reducing the industry's demand for fuel. Indeed, in

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[3] See note 1, *supra*, and accompanying text.

Unger the trial judge on several occasions noted that there was no evidence relating to an effect on commerce in the case.[4]

Though in affirming both convictions the majority concedes that it was necessary for the Government to establish in each case that a labor dispute in the apartment-house industry would "affect" the industry's demand for fuel, in order to excuse the Government's failure to prove "affect" in either case, it invokes the rule that formal proof of facts known at once with certainty is not required.[5] In adopting this view of the Government's case the majority first asserts that unquestionably a strike or slowdown of superintendents who operate apartment-house heating systems would reduce the industry's demand for fuel. Stating that to be so, the majority then says that in Ricciardi's case such an obvious fact need not have been proven at trial, or submitted to the jury for resolution, since jurors would know it of their own knowledge, anyway. And in Unger's case the majority declares that it will take judicial notice of this "obvious" fact, thereby enabling it to affirm Unger's conviction according to the rules set forth in Ricciardi's case.

This approach by the majority is unsatisfactory for it collapses the distinction between two separate issues upon which the Government did not adduce proof in either case; the first is whether a labor dispute between the superintendents and the apartment-house owners would, in fact, decrease the industry's demand for fuel, the second is, assuming that it did occur, whether the decrease would be

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[4] See Appendix to Brief for Appellant, pp. 94a-95a, 132a, 163a.

[5] See McCormick, *Evidence* §§323-24 (1954).

more than *de minimis*. If the first issue could be affirmatively resolved from the evidence of record one could say in Ricciardi's case that the jury might rely on its own experience to conclude that in an industry comprising between 800 and 2,000 apartment buildings, each consuming more than $1,000 in fuel, the decrease would be more than *de minimis*. And assuming the first issue had been affirmatively resolved in Unger's case one could take judicial notice that the effect of the decrease on industry demand would be more than *de minimis*, even though no evidence was introduced tending to show the dollar value of the fuel consumed in the apartment buildings properly constituting the industry. However, I am not persuaded that it is common knowledge that a labor dispute in this industry would decrease the industry's demand for fuel. I should have thought it likely that all the landlords would rapidly make the minor adjustments necessary to operate the heating systems themselves; and that, if this were done, the industry's demand for fuel would not decrease. This view prevents me from attributing to Ricciardi's jury the knowledge necessary to resolve the first issue affirmatively; likewise I cannot join my brothers who believe it possible to take judicial notice of this fact.[6]

As I have pointed out, the majority assumes that in order for the Government to convict these defendants it

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[6] *United States* v. *Pecora*, 267 F. 2d 512 (3 Cir. 1959), the only case cited by the majority that arises under 29 U. S. C. §186 and deals with the rule that well known facts need not be formally proved, is distinguishable. There is a world of difference between taking judicial notice of the proposition that "interstate highways affect interstate commerce," 267 F. 2d 512 at 515, and taking judicial notice that a janitors' strike in the Bronx would affect it to a demonstrable degree.

was necessary that the Government prove a labor dispute in the Bronx apartment-house industry would, in fact, decrease the industry's demand for fuel; the majority sustains the convictions, despite a failure of formal proof, because it concludes that formal proof of such an obvious fact is not required. I believe the convictions should be sustained on the ground that proof of effect is not required on a case-by-case basis in prosecutions commenced under 29 U. S. C. §186(a) and (b). Persuasive authority for this position is found in several decisions construing Section 2(7) of the National Labor Relations Act, 29 U. S. C. §152(7), which defines "affecting commerce" for purposes of that Act.[7]

In *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F. 2d 94 (2 Cir. 1961), our court declined to enforce an order of the National Labor Relations Board asserting jurisdiction over Reliance Fuel Corporation, a company that sold fuel for heating purposes to New York State customers. Reliance did not make any significant out-of-state purchases, but Reliance did purchase in one calender year fuel oil and related products valued at more than $650,000 from the Gulf Oil Corporation. Almost all of the products Reliance purchased from Gulf were refined outside of New York State and then shipped to Gulf's in-state storage facilities. Gulf in turn distributed the products to local storage tanks, one of which served the needs of Reliance. On this evidence we refused to enforce the Board's order. Our court said:

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[7] Section 2(7) of the National Labor Relations Act defies the term "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U. S. C. §152(7).

> . . . if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct commerce . . . 297 F. 2d 94, at 99.

Accordingly, our court remanded the case to the Board "with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." *Ibid.* The Supreme Court in a brief *per curiam* opinion reversed the Second Circuit, *NLRB* v. *Reliance Fuel Oil Corporation*, 371 U. S. 224 (1963), stating that on the evidence of record the Board was justified in finding that "commerce" had been "affected." *Id.* at 227.

In view of the Supreme Court's opinion in *NLRB* v. *Reliance Fuel Oil Corp., supra,* it can be persuasively argued that a business not itself in interstate commerce nevertheless "affects" interstate commerce within the meaning of Section 2(7) of the National Labor Relations Act if the business makes substantial purchases of materials that have moved in interstate commerce, and that when evidence of substantial purchases of such materials has been introduced this effect has been conclusively established. See *NLRB* v. *Cross,* 346 F. 2d 165 (4 Cir.), *cert. denied,* 86 Sup. Ct. 290 (1965). And if the requisite effect on interstate commerce of a business not itself in interstate commerce can be established for purposes of Section 2(7)

merely by proving that the business purchases significant amounts of material that once moved in interstate commerce it seems to follow that effect should similarly be provable in criminal prosecutions involving industries or activities not themselves in interstate commerce commenced under 29 U. S. C. §186(a) and (b). This follows from the fact that the justification for the rule that effect need not be proved on a case-by-case basis is that there is an interest in the expeditious enforcement of federal labor policy, and from the further fact that this interest does not seem to be more worthy of consideration in unfair labor practice proceedings than it is in criminal prosecutions brought under Section 186(a) and (b). If the Supreme Court has ruled that effect may be established in unfair labor practice proceedings by proof of significant purchases of material that once moved in interstate commerce I cannot believe that it did not intend this rule also to apply in criminal proceedings brought to enforce federal labor policy. Therefore, I concur with my brothers in affirming the convictions below on the ground that the Government need not introduce evidence tending to prove that interstate commerce would be burdened by a labor dispute in an industry that is not "in commerce" but need only introduce evidence tending to show that the businesses which comprise the industry purchase significant amounts of material that once moved in interstate commerce.[8] Cf. *NLRB* v. *Cross, supra.*

[8] It might be argued that this does not dispose of Unger's case since in that case the Government introduced no evidence tending to prove the dollar value of the fuel consumed in the approximately 5,500 apartment buildings in the Bronx and Westchester organized by Unger's union. However, as I suggest in the body of my concurring opinion, I am quite willing to take judicial notice that an industry defined to include so many businesses would purchase more than a *de minimis* amount of fuel.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of February, one thousand nine hundred and sixty-six.

Present:

HON. HAROLD R. MEDINA,
" STERRY R. WATERMAN,
" LEONARD P. MOORE,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VINCENT J. RICCIARDI,

Defendant-Appellant,

FRED MEYER, STANLEY M. UNGER,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix—Judgment

This cause came on to be heard on the trancript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1171

VINCENT J. RICCIARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966 (Pet. App. 28a). A petition for rehearing was denied on March 2, 1966. The petition for a writ of certiorari was filed on April 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal district court had jurisdiction to try petitioner—a representative of apartment-

house employees—for accepting money from employers.

2. Whether the trial judge (who submitted the jurisdictional question to the jury) correctly refused petitioner's requested instruction that the jury consider evidence that the National Labor Relations Board never assumes jurisdiction over apartment houses having fewer than 30 units.

3. Whether the relevant "industry affecting commerce" in this case encompassed all apartment houses having 30 or fewer units in Bronx County.

STATUTES INVOLVED

29 U.S.C. 186 provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly

or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

29 U.S.C. 142 provides in pertinent part:

When used in this chapter—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

* * * * *

29 U.S.C. 152 provides in pertinent part:

When used in this subchapter—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory

or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of fifteen counts charging that he unlawfully accepted sums of money from employers of the employees he represented, in violation of 29 U.S.C. 186. He was sentenced to concurrent terms of imprisonment for one year on counts 1–14; and to imprisonment for one year on count 15, with execution suspended for a probationary period of three years during which he was not to serve as an employee of any labor organization. The court of appeals affirmed (Pet. App.).

The evidence showed that on fifteen occasions between August 11, 1959, and December 4, 1962, petitioner, who was in charge of Council 7, a subdivision of Local 32–E, Building Service Employees International Union, negotiated collective bargaining contracts with twelve employers or their agents, who, at petitioner's suggestion, paid him various sums of money to obtain favorable terms (R. 30a–101a). The membership of Council 7 was limited to superintendents of apartment buildings of 30 units or less in Bronx and Westchester Counties, New York (R. 22a–

23a).[1] In 1959, the owners of 700 such buildings had contracts with Council 7, and in the following years the Council received approximately 200 certifications annually from the New York State Board of Mediation and Arbitration (R. 24a–25a). The duties of the superintendents included providing heat in the buildings where they worked (R. 22a). All of the fuels used in the buildings came from outside New York State (R. 29a–30a), and the annual fuel costs for six of the employers totalled $18,700 (R. 70a, 76a, 79a, 86a, 96a, 101a).

ARGUMENT

1. Petitioner contends that the court lacked jurisdiction to try him because the employees whom he represented were not employed in an industry affecting commerce. The contention is without merit. Since it is clear that Congress, in the National Labor Relations Act and its amendments, exercised to the fullest extent its power under the commerce clause to reach all matters which affect or interrupt interstate commerce,[2] the only question is whether a strike

[1] Superintendents of larger buildings belonged to the parent Local, of which petitioner was a vice-president (R. 21a). Some employers paid petitioner to keep their buildings under the jurisdiction of Council 7 so as to avoid paying the pension and welfare contributions required by Local 32–E (R. 35a–36a, 78a–79a). Others made payment in order to obtain reductions in wages or to discharge their employees without union objection (R. 35a–36a, 44a–46a, 54a–55a, 68a–69a, 73a–74a, 81a–83a).

[2] *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601; *Guss* v. *Utah Labor Board*, 353 U.S. 1; *National Labor Relations Board* v. *Reliance Fuel Oil Corporation*, 371 U.S. 224, 225. Thus, in *Cutler* v. *American Federation of Musicians*, 211 F. Supp. 433 (D. N.Y.), affirmed, 316 F. 2d 546 (C.A. 2), cer-

of employees in the industry defined as the operation of apartment houses having 30 or fewer units could obstruct or tend to obstruct the free flow of interstate commerce in an amount more than *de minimis*. *National Labor Relations Board* v. *Dallas City Packing Co.*, 230 F. 2d 708 (C.A. 5). Clearly it could. The fuel alone which the apartment houses under Council 7's jurisdiction used was substantial—a mere 6, out of the hundreds of apartment houses under the Council's jurisdiction, purchased a total of more than $18,000 worth of fuel per year—and all was obtained from outside the State. Thus, a labor dispute with petitioner's Council would inevitably obstruct the free flow of a substantial amount of interstate commerce.[3] That is all the statute and the Constitution require.

2. The trial court submitted to the jury the jurisdictional question of what constitutes an "industry affecting commerce" (R. 115a–117a),[4] but refused

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tiorari denied, 375 U.S. 941, a case arising under 29 U.S.C. 186, the court found that the statutory phrase "industry affecting commerce" embraced the single-engagement business in the music field.

[3] See *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, *supra*; *Shirley-Herman Co.* v. *International Hod Carriers*, 182 F. 2d 806 (C.A. 2); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451 (C.A. 5); *National Labor Relations Board* v. *Citizens Hotel Co.*, 313 F. 2d 708 (C.A. 5); *Greene County Farm Bureau Cooperative Association, Inc.* v. *National Labor Relations Board*, 317 F. 2d 335 (C.A. D.C.).

[4] Other courts have treated the determination of what constitutes an "industry affecting commerce" as a question of law for the court to decide. *United States* v. *Gibas*, 300 F. 2d 836, 839 (C.A. 7), certiorari denied, 371 U.S. 817; *United States* v. *Pecora*, 173 F. Supp. 764 (W.D. Pa.), affirmed, 267 F. 2d 512

petitioner's request to charge the jury that they could consider evidence that the National Labor Relations Board never takes jurisdiction over disputes involving apartment buildings having 30 or fewer units but leaves such disputes to State labor boards. This was sound. The National Labor Relations Board has, as a matter of discretion, never exercised the full measure of its jurisdiction. *Guss* v. *Utah Labor Board*, 353 U.S. 1; *Office Employes International Union* v. *National Labor Relations Board*, 353 U.S. 313. Relinquishing a particular matter within the Board's jurisdiction to concurrent State jurisdiction is obviously no indication that the matter is not within its jurisdiction, but quite the contrary.[5]

3. The trial judge instructed the jury that, for the purposes of this trial, "the ownership, operation and management of apartment houses in The Bronx of 30 or less apartments may be considered an industry" (R. 115a), and that, "[i]f, upon all the evidence, you find that the purchase, sale, transportation or distribution of fuel originating outside the state, and normally required by the industry, would be interfered with by a stoppage or strike, then you have sufficient

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(C.A 3). Since as shown above the industry here involved is, as a matter of law, one that affects commerce within the meaning of 29 U.S.C. 186, petitioner cannot have been prejudiced by the trial court's submission of the issue to the jury.

[5] Petitioner's related contention that evidence that Local 32–E had been certified by the National Labor Relations Board was prejudicial is clearly without merit, in light of the subsequent testimony by the same witness that the Board never issued a certification for any employee affiliated with Council 7 (R. 25a).

[evidence] upon which to find that it is an industry affecting commerce" (R. 116a). This definition of the relevant "industry affecting commerce" was correct. The industry affected was not, as petitioner would have it, limited to the employers named in the indictment or those having contracts with unions belonging to Council 7. The Council's jurisdiction potentially extended over the entire area of Bronx County and the large number annually of additional certifications indicated that the Council was actively engaged in organizing more apartment houses within its authorized area. See *Anderson* v. *United States*, 262 F. 2d 764, 770 (C.A. 8), certiorari denied, 360 U.S. 929. A restricted application of the term "industry affecting commerce" would not take into account the full orbit of petitioner's potential influence, and would defeat the intended broad construction of the statute. See *Carroll* v. *American Federation of Musicians*, 295 F. 2d 484 (C.A. 2); *Cutler* v. *American Federation of Musicians*, 211 F. Supp. 433 (D. N.Y.), affirmed, 316 F. 2d 546 (C.A. 2), certiorari denied, 375 U.S. 941.[6]

[6] Even if the industry be limited to the apartment houses under the Council's jurisdiction, we have already shown that the effects on commerce were sufficient to bring petitioner's conduct within the statute. The submission of the jurisdictional issue to the jury on a broader theory did not, of course, alter the conclusion of law that the court had jurisdiction to try petitioner. *United States* v. *Green*, 246 F. 2d 155, 161 (C.A. 7), certiorari denied, 355 U.S. 871; *United States* v. *Lowe*, 234 F. 2d 919, 922 (C.A. 3), certiorari denied, 352 U.S. 838.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1966.

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